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ABATEMENT.

Where a party to an action dies after judgment, the action abates, just as it would by his death before judgment, unless it be revived by or against his personal representative. All executions tested after its abatement and before its renewal, would be irregular, and any lien acquired by such executions would be destroyed. *Aycock, to use Isler* v. *Harrison*, 432.

ACCOUNT.

In any proceeding, where it becomes necessary to take an account, and that account has been reported by the Commissioner to whom it was referred, the presiding Judge, if in his opinion such account is imperfect, may recommit it to the same Commissioner, in order that it be reformed or perfected. *Turner* v. *Haughton*, 370.

See JUSTICES OF THE PEACE, 1, 2; TRUSTS, &c.

ACTIONS.

1. An action for a breach of covenant, in not paying for improvements put by the mortgagors upon certain mortgaged premises, must be brought under sec. 68 of the Code of Civil Procedure, in the county in which the plaintiffs or the defendants, or any of them, resided at the commencement of the action. *Phillips* v. *Holmes*, 250.
2. Where the son of the plaintiff was placed with the defendants, machinists, under a special contract to work for four years, and the son was discharged without any good or sufficient reasons before the end of the second year, the father (plaintiff) may treat the contract as rescinded, and may immediately sue on a *quantum meruit* for the work actually performed by the son. *Harris* v. *Separks, Hicks & Co.*, 372.
3. When a change of interest takes place during the progress of a suit, the plaintiff may make the change known, by a supplemental complaint, by which the new owner becomes practically substituted as plaintiff for the former one. *Murray, Ferris & Co.*, v. *Blackledge*, 492.
4. The equitable owner of land may maintain an action for its recovery, although the legal estate is in his trustee. *Ibid.*

ADMISSIONS.

See ESTOPPEL.

AFFIDAVIT.

See ATTACHMENT 2; RECORDARI.

AGENT.

See EXECUTORS AND ADMINISTRATORS, 1; Notice, 1, 2.

AMENDMENT.

1. The legal effect of an amendment, is, to put the case in the same plight and condition as if the matter introduced by the amendment had been inserted in the original pleading at the outset. *Wynne* v. *Liverpool & London Ins. Co.*, 121.

2. The Court below has no power to permit a Sheriff after a lapse of three years, to amend his return on certain executions, thereby changing the levy then made on 950 acres of land, to a levy on 1,800 acres of land. *Williams* v. *Houston*, 163.

See ATTACHMENT, 4; SUPERIOR COURT, 2.

ANSWER.

An answer denying "the said complaint and each and every allegation contained therein, and" demanding "judgment against the plaintiff for their costs," &c., is a sham plea, which the Court below should have stricken out on motion. *Schehan* v. *Malone & Co.*, 440.

APPEAL.

1. An order of a Judge, for the defendant to appear at a subsequent time and show cause why a receiver may not be appointed, does not involve any matter of law nor affect any substantial right, and therefore, is not such an order as can be appealed from. *Gray* v. *Gaither*, 55.

2. An appeal to this Court, without bond, must be perfected, as prescribed by the Act of 1869–'70, chap. 196, during the term of the Court. If not so perfected, it is a nullity and cannot vacate or suspend the judgment of the Court. *State* v. *Dixon*, 204.

3. When a defendant has once been tried and acquitted upon an indictment, good in form, no appeal lies, even though the acquital is in consequence of the erroneous charge of the presiding Judge. *State* v. *West*, 263.

See CERTIORARI; EXECUTORS AND ADMINISTRATORS, 5; SUPERIOR COURT, 1.

ARSON.

See INDICTMENT, 1.

ASSESSMENT OF DAMAGES.

In a proceeding by the Commissioners of a town to condemn the land of one of its citizens for the purpose of running a street through the same, the jury, in assessing damages, cannot consider any advantage accruing to the owner of the property, in common with the public; on the contrary, it is their duty to consider in such assessment, any *special benefit* to the property arising from the opening of such street. *Commissioners of Asheville* v. *Johnston*, 398.

ASSIGNEE.

See PARTIES, &c., 1.

ATTACHMENT.

1. Where land was conveyed to one *in trust* for certain purposes, and afterwards upon an attachment against the trustee at the suit of one of his creditors, the land was levied upon and sold, and purchased by the plaintiff: *Held*, that the trustee had such an estate as was subject to levy and sale; and that as against the defendant who failed to connect himself in any manner with the *cestui que trust*, the purchaser acquired a title which entitled him to the possession. *Stith* v. *Lookabill*, 25.

2. An affidavit, in which it is stated that the defendant is "non-resident of this State," but does not state that he "has property within the same," is not sufficient to justify a service by publication. *Spears v. Halstead, Haines & Co.*, 209.

3. The Clerk of the Superior Court has jurisdiction to vacate an attachment, notwithstanding the act of 1870-'71, chap. 166, makes the process returnable to Court in term time. *Pulmer* v. *Bosher* and *Clark*, 291.

4. A plaintiff has a right to amend his affidavit as to mere matters of form; and if he is ready to swear to the amended affidavit, it is error in the Clerk to refuse it. *Ibid.*

AUDITOR OF STATE.

See MANDAMUS, 3.

BANK OF STATESVILLE.

See INTEREST.

BANKRUPTCY.

A discharge in bankruptcy after due publication of notice, is a good bar to the claims of all creditors who do not allege and show that the omission to give notice was the result of fraud on the part of the debtor, and not the result of forgetfulness, accident or mistake. *Knabe & Co.* v. *Hayes*, 109.

BASTARDY.

See CRIM. PRACTICE.

BEYOND THE SEAS.

See STAT. LIM., 2.

BONDS.

In an action upon a bond, the *sum demanded* is the penalty of the bond, and not the damages claimed for the breach thereof;

Therefore, where the penalty of the bond exceeds two hundred dol'ars, suit cannot be brought before a Justice of the Peace. *State ex rel. Bryan* v. *Rosseau*, 194.

CASE SUBMITTED WITHOUT ACTION.

See PRACTICE, CIVIL, 7.

CERTIFICATE.

See ELECTION, 2.

CERTIORARI.

A writ of *certiorari* can only issue to the Court wherein the cause is pending. Therefore, when the cause has been carried by appeal to the Supreme Court, the petition for the writ to the Court below should be dismissed. *Williams* v. *Williams*, 427.

CHALLENGE.

See JURORS, 1.

CITIES AND TOWNS.

1. The Act of 1854-'55, empowering the Commissioners of the town of Wil mington to establish streets in said town and for other purposes, confers upon the present Commissioners of that place, full authority to assess the benefit to be derived to the owners of property, from the construction of pavements in front of their houses. *City of Wilmington* v. *Yopp*, 76.

2. Where, in 1758, the owner of a certain tract of land in Perquimans county "signified to the Governor and Council and Assembly his free consent, by certificate under his hand and seal, to have 100 acres of said land laid off for a town and 50 acres for a town common;" and there upon an act was passed appointing directors and trustees to lay off the land in lots, &c., and another act in 1778, to regulate said town, &c.: *It was held*, that this act of the owner, together with the acts mentioned, had the effect to vest the beneficial interest in the town of Hertford, which interest the Court will not permit to suffer or be defeated by any break in the office of directors, or by their being called by another name, but will recognize the present officers or appoint others, if necessary, to preserve the estate. *Commissioners of Hertford* v. *Winslow*, 150.

3. The private Act of March, 1870, chap. 123, gives the Commissioners of the town of Edenton power to tax *all* persons who pack and ship fish, &c., from said town, whe ther residents or not. *Commissioners of Edenton* v. *Capehart*, 156.

4. The Commissioners of the city of Newbern have the power under their amended charter to levy and collect for current expenses, taxes to the amount of $6,000, observing in such collection the equation and limitation prescribed in the Constitution. But they have no authority to col-

lect taxes to pay "new debts," unless the proposition is submitted to the voters of the town, even though commanded by *mandamus*. *Weinstein* v. *Commissioners of Newbern*, 535.

See ASSESSMENT OF DAMAGES.

CLERK—SUPREME COURT.

There is no provision of the law requiring the Clerk of this Court to certify to a Court below the *opinion* as distinguished from the *decision* of a case. *State* v. *Ketchy*, 147.

CLERK—SUPERIOR COURT.

See ATTACHMENT, 3, JUDGE OF SUPERIOR COURT, 1.

COLLECTION.

See SHERIFFS, &C.

COMMISSIONER—REFEREE.

See ACCOUNT; PRACTICE CIVIL, 12, 13, 15, 16; SALE OF REAL ESTATE.

COMMISSIONERS OF SINKING FUND.

A committee of three persons appointed by the plaintiff, Commissioners of a Sinking Fund, authorized by law, and empowered to exchange N. C. bonds, known as "old sixes," for those known as "new sixes," must, in effecting such exchange, *all act together*; and any attempted exchange by one or two of such committee without consultation with, and concurrence of the other members thereof, is utterly void, and in no ways binding on the plaintiff. *N. C. Railroad Co.* v. *Swepson*, 350.

COMMISSIONS.

See GUARDIAN AND WARD.

COMPROMISE.

See REHEARING, 3.

CONFEDERATE MONEY.

The borrower of Confederate currency must repay the real value which he received, and not its mere nominal representative.

Therefore, where A loaned B $2,700 in Confederate money on the 16th day of October, 1862, for which a promissory note was given, A at the time verbally promising to take the same currency in re-payment at any time within twelve months, within which time B tendered the amount of the note in such money, and A refused it: *Held*, in an action on the note, that A was entitled to recover the full amount thereof, subject to the legislative scale at the time the note was given, and interest. *Wooten* v. *Sherrard*, 374.

See EXECUTORS AND ADMINISTATORS, 12, 13.

CONTRACTS AND AGREEMENTS.

1. An agreement to receive a part of an ascertained debt in discharge of the whole, is a *nudum pactum*, and cannot be enforced, although such agreement is styled by the parties a "compromise," and so entered on the execution docket. *Mitchell* v. *Sawyer*, 70.
2. A contract to purchase, though in some respects regarded as a mortgage, is not void as to subsequent purchasers for want of registration. *Edwards* v. *Thompson*, 177.
3. The law prohibits everything which is *contra bonos mores*, and therefore no contract which originates in an act contrary to the true principles of morality, can be made the subject of complaint in Courts of justice. *King* v. *Winants*, 469.
4. An ante-nuptial contract, entered into between a husband whose domicile was in North Carolina and a wife whose domicile was in New York, and which was duly registered in New York, but not in North Carolina, is good against creditors of the husband, although the property was removed to North Carolina, and changed from what it originally was when the contract was signed. *Hicks* v. *Skinner*, 580.

See ACTION.

CREDITOR.

See EXECUTORS AND ADMINISTRATORS, 2, 3, 11.

CROPPER.

See LANDLORD AND TENANT, 1, 2.

COUNTY COMMISSIONERS.

1. County Commissioners, by auditing and allowing debts contracted prior to the adoption of the Constitution, do not so change their character as to subject them to the restriction contained in the Constitution relative to taxation. *Mauney* v. *Commissioners of Montgomery*, 486.
2. A *mandamus* issued against the Commissioners of a County, commanding them to assess, levy and collect taxes, sufficient to pay off the indebtedness of the county, does not warrant them in levying taxes in any other manner, or at any other time, than that prescribed by law, to wit: at their regular meeting on the first Monday in February. *Ibid.*
3. The Constitutional limitation and equation of taxation do not apply to debts made previous to the adoption of the Constitution; to debts contracted since the adoption of the Constitution, they both apply. *Ibid.*

COURTS OF PROBATE.

1. The powers of Courts of Probate, both as to jurisdiction and as to practice and procedure, extend equally to administrations granted prior and subsequent to the first day of July, 1869; and letters of administration may be granted to a public administrator subsequent to 1st July, 1869, although the original administration was prior to that date. *Taylor* v. *Biddle*, 1.

2. Judges of Probate in our State are by Art. IV, Sec. 17, of the Constitution, vested with the general jurisdiction and powers of the Ordinary at common law, and with such other additional powers as are conferred by our statutes; of which the power to remove any administrator for failing to discharge the duties of his office, prescribed by law, is one. *Ibid.*

3. In administrations granted since the 1st day of July, 1860, the Probate Judge alone has jurisdiction to compel the administrator to a settlement and to state his account, and apportion the assets among the creditors. Bat. Rev., chap. 90, sec. 1. The Probate Court has likewise power, upon a deficiency of assets, to order a sale of the land. *Ballard* v. *Kilpatrick*, 281.

4. Every action brought in the Probate Court to recover a debt against an administrator is necessarily a creditor's bill, as all the creditors must be brought in and their claims ascertained, before any judgment for the payment of any one can be given. *Ibid.*

5. An action to recover a legacy of $150, although it is alleged the executor promised to pay the interest on it and failed, must be brought in the Probate Court of the County in which the will was proved. *Bidwell* v. *King*, 287.

6. In an appeal from a judgment of a Probate Court, refusing to require the re-probate of a will, on the application of certain of the heirs of the deceased, the proper judgment of the Superior Court granting the application, is, to remand the proceedings to the Probate Court, there to be proceeded with according to law, by making up issues and transmitting them to the Superior Court for trial. C. C. P., sec. 447. *King* v. *Kinsey*, 407.

7. Section 481, Code of Civil Procedure, is repealed by sec. 134, chap. 45, Bat. Revisal, which latter is the only and exclusive remedy to recover a distributive share of an estate. *Williams* v. *Williams*, 427.

COVENANT.

1. A conveys to B a tract of land with a covenant against incumbrances, both parties, at the time, having full knowledge of the existence of valid, outstanding incumbrances upon the land conveyed: *Held*, that, under the principle of *caveat emptor*, B in the absence of fraud or mistake in procuring it, is entitled to recover on the covenant. *Gragg* v. *Wagner*, 316.

See ACTION.

DECLARATIONS.

See EVIDENCE, 3, 5.

DEEDS AND CONVEYANCES.

1. The recital in a sheriff's deed that the land of A was levied on and sold, cannot, by parol evidence, be enlarged so as to include the interest of B in the same; although at the time of the sale, the sheriff had in his hands

executions against both A and B, and stated that the interest of B was at the time sold. *Wade* v. *Pellitier*, 74.

2. The recital in a sheriff's deed is not a necessary part of it, and if the deed misrecites the execution under which the sheriff sells, or recites no execution, the sale is nevertheless good, if at the time it is made, the sheriff had in his hands a valid execution. *Jones* v. *Scott*, 193.

3. A deed which conveys to one certain property naming the same *seriatim*, and which also conveys "all my other estate and interest," does not include a mule which the grantor had theretofore given to her grand-son. And as the gift to the grand.son was without consideration, the mule was subject to the debts against the grantor. *Norment* v. *Parks*, 227.

4. Where a deed was proved before the Clerk of the late County Court, who wrote opposite the witness' name the word "Jurat," and who swore that the witness did prove the deed: *Held* to be a sufficient compliance with the law, to authorize the registration of such deed. *Starke* v. *Etheridge*, 240.

5. A deed made to O. P. & Co., by the firm name, instead of the individual members of the firm, is not for that reason void. It is a latent ambiguity, which may be explained by parol. *Murray, Ferris & Co.* v. *Blackledge*, 492.

See NOTICE.

DEMURRER.

See PRACTICE CIV., 5.

DEVISAVIT VEL NON.

See EVIDENCE, 8.

DOMICILE.

See CONTRACT, 4.

DOWER.

The dower in the land charged with the payment of a certain sum, cannot be called upon until it is ascertained that the remaining two-thirds and the reversion in the one-third assigned for dower, is insufficient to pay off the incumbrance. *Ruffin* v. *Cox*, 253.

EASEMENT.

See STAT. LIM., 3.

EDENTON.

See CITIES, &C., 3.

EJECTMENT.

On the trial of an action of ejectment, evidence that at the time the land in dispute was conveyed to the lessor of the plaintiff, the defendants were

in possession, claiming the same adversely, is admissible, and its exclusion by the Court is error. *Young* v. *Griffith*, 335.

ELECTION.

1. The election held in Raleigh Township, County of Wake, under the authority of the Act of 1873-'74, chap. 138, where there was no opportunity afforded the citizens to register, is void. *Perry* v. *Whitaker*, 475.
2. A certificate signed by a Justice alone, when the act requires the same to be signed by the "Inspectors and the Justice," and in which it is not stated that the votes were compared, is not the certificate required by the act to be registered. *Ibid.*

See INDICTMENT, 4, 5; PARTIES, &c., 8.

ENDOWMENT FUND, N. C.

See PRIV. STATUTES.

ENTRY.

See INJUNCTION, 3.

ERROR.

See JURORS, 3; NEW TRIAL, 1, 2, 3; NUISANCE, 1; SALE OF REAL ESTATE.

EQUITY OF REDEMPTION.

See MORTGAGES, 2, 3, 4.

ESTOPPEL.

1. In an action for the recovery of real estate, an admission by the plaintiff that the question of title to the same land had been tried in a former suit between himself and the same defendants, and that it had been found against him, will estop him from any further proceedings, and justifies a verdict for defendants. *Isler* v. *Harrison and Foy*, 64.
2. Where the defendant was induced to purchase certain real property by the representations of the plaintiff, at the time deputy sheriff, that there were no liens on the same, when at the same time the deputy sheriff had in his hands an execution binding the property, or it was in the hands of the sheriff, within the knowledge of the deputy, who purchased the same when sold under that execution: *Held*, that the deputy sheriff was estopped from setting up the title obtained under the execution sale, to the prejudice of the defendant, and that he will be compelled to convey to the defendant the title so obtained. *Gill* v. *Denton*, 341.
3. An estoppel must be certain at least to a common intent. The subject matter, and the estate to which it is sought to be applied, must be ascertained with reasonable certainty. *German* v. *Clark*, 417.

EVIDENCE.

1. In answer to evidence of contradictory statements, and for the purpose of corroborating the testimony of the witness, whose veracity has been

thus impeached, evidence of the strict integrity of such witness, and of his scrupulous regard for truth is admissible. *Isler* v. *Dewey*, 14.

2. The rule obtaining in some of the English and American Courts, that evidence in support of good character is not admissible until the character of the witness has been attacked by an impeaching witness, is not the rule in this State. *Coltraine* v. *Brown*, 19.

3. The declarations of one who is a competent witness is admissible, though offered for the purpose of connecting the witness with the crime for which the prisoner is being tried. Proving his acts tending to establish his guilt, is as far as the rules of practice will permit. *State* v. *Haynes*, 80.

4. When the prisoner broke and entered the dwelling of the prosecutrix at about 10 o'clock at night, after the inmates had retired, and when discovered fled: *Held*, there was some evidence that he entered the same with *intent* to steal, &c. *Ibid.*

5. Any circumstances tending to show the guilt of the accused, may be proved, although it was brought to light by a declaration inadmissible *per se*, as having been obtained by improper influence, *Therefore*, evidence as to the condition of the prisoner's hand at the time of holding the inquest is admissible, although the prisoner was then compelled to exhibit her hand by the Coroner after objection on her part. *State* v. *Garrett*, 85.

6. Where the evidence against the accused is wholly of a circumstantial nature, it is competent to show malice by his own acts and declarations, as a link in the chain, fixing him as the guilty party. *State* v. *Gailor*, 88.

7. When written orders are introduced on a trial as corroborating evidence, such orders need not be proved, and it makes no difference whether the witness speaking of them, and for whose benefit the orders were drawn, could read and write or not. *State* v. *Capps*, 93.

8. On the trial of an issue, *devisavit vel non*, no presumption of fraud, as a matter of law, arises from the fact that one of the legatees was a general agent of the testator; and the charge of the Court that in such cases fraud was to be determined by the evidence, was correct. *Lee* v. *Lee*, 139.

9. Notwithstanding the restrictions contained in sec. 343, C. C. P., in relation to a person's testifying as to any matter between himself and a deceased person, when his executor or administrator is a party, he may, as heretofore, be permitted to testify under the book-debt law. *Leggett* v. *Glover*, 211.

10. Whether there be *any* evidence, is a question for the Judge. Whether it is *sufficient evidence*, is a question for the jury. *Wittkowsky & Rintels* v. *Wasson*, 451.

11. A *scintilla* of evidence will not justify the Judge in leaving the case to the jury. There must be evidence from which the jury might reasonably come to the conclusion that the issue was proved. *Ibid.*

12. The burden of proving an affirmative defence is on the party who makes it. Therefore, it is necessary for the heirs to prove that their possession

of certain land, outside of the dower, was adverse to the plaintiff who claimed under a Sheriff's deed, when they allege such a fact. *Millsaps* v. *McCormick*, 531.

See EJECTMENT.

EXCUSABLE NEGLECT.

1. The fact that a defendant supposed a summons which was served on him to be a paper in another cause pending between himself and plaintiff, and for that reason did not take any measures to answer the same, is not such excusable neglect as entitles him to relief. *White* v. *Snow*, 232.
2. A motion to vacate a judgment and be allowed to plead on account of excusable neglect, under sec. 133, C. C. P., is addressed to the discretion of the presiding Judge, whose decision is not subject to review. *Simonton* v. *Lanier*, 498.

EXCHANGE OF BONDS.

See COMMISSIONERS OF SINKING FUND.

EXCEPTIONS.

See PRACTICE, CIV. 12, 13, 15, 16.

EXECUTORS AND ADMINISTRATORS.

1. Where the next of kin of an intestate, whose estate was not indebted, appointed A and B. their agents to settle the estate and make distribution; and as such, A. and B sold the personals, taking bond payable to "A *or* B, agents;" and afterwards C was duly appointed administrator of the same estate, who settled with A and B, taking the said bond and transferring it to one of the next of kin, as her distributive share. *Held, first*, that the conjunction "*or*" in said bond should be construed to mean *and;* and *second*, that A and B were not executors *de son tort*, and the bond was valid, which the defendants, the obligors would have to pay to the assignee of the administrator. *Outlaw* v. *Farmer*, 31.
2. The creditor of a deceased ancestor is entitled when there is no personal estate, to the whole of the land descended, or, of what is instead of it, until his debt is paid. *Hinton* v. *Whitehurst*, 68.
3. When some of the heirs of a person so indebted have sold the lands descended to them, two years after administration granted, they are liable to the creditor for the whole of the price received and not for their aliquot shares of the debt itself; and those who still retain their several shares are liable for the present value of them. *Ibid.*
4. The creditor is entitled to the rents and profits actually received by the heirs from the lands descended. If the land has been sold the interest is the profit; and if the heir still retains his share, he is equally liable for the profits. *Ibid.*
5. Administrators and all other parties to the record, prosecuting or defending, are permitted, under the act of 1873-'74, chap. 60, sec. 1, to appeal to the Supreme Court, without giving security therefor. *Mason* v. *Osgood*, 212.

6. An administrator is not required to insure the estate of his intestate; but he is required to be honest, faithful and diligent. *Dortch* v. *Dortch*, 294.

7. If an administrator retains the funds of his intestate to meet the exigencies of his office, or to discharge the debts against the estate, when established, or because there are none within the jurisdiction of the Court authorized to receive it, he is not only permitted, but encouraged to invest such funds in interest bearing securities. *Ibid.*

8. An administrator regularly appointed, succeeds to all the rights of a special administrator. *Cowles* v. *Hayes*, 230.

9. When a stranger administers on the estate of one of several wards owning a common fund, he can and ought to make an actual division of the fund with the guardian of the surviving wards, and file in Court an inventory and descriptive list of the bonds, notes and other items comprising the estate. *Culvert* v. *Peebles*, 274.

10. If the guardian makes himself administrator of one of his wards, he must also sever the tenancy in common, and file of record an inventory and descriptive list of the separate share of his intestate, (ward.) *Ibid.*

11. An administrator does not always represent the creditors of his intestate; though, as a general rule, in controversies respecting the personal property, or what from circumstances may be considered personal property, the administrator represents the creditors and next of kin. And if, in an action concerning such property, the administrator fails to set up an estoppel against certain parties claiming it, the creditors are concluded by his action. *German* v. *Clark*, 417.

12. Every case of an administrator or other fiduciary, who received depreciated Confederate currency, must, to a considerable extent, be judged of by its surroundings. Before 1863, it might be received. During 1863 its reception was debatable. Since 1863, it could not be received. *Larkins* v. *Murphy*, 560.

13. An administrator, who had in hand an *ante-bellum* bond, apparently well secured, and there appeared no necessity for collecting it, and yet did collect it, in part payments at different times during the years 1863 and 1864, is liable for the amount of the same. (By agreement in this case, less was taken.) *Ibid.*

See COURT OF PROBATE, 1, 2, 3, 4, 5, 7; NOTICE, 3; WITNESSES, 2.

EXECUTION.

1. A plaintiff, whose execution has been levied on the defendant's land, and a sale advertised, who postponed the sale, does not thereby waive or loose the priority of his lien in favor of a junior execution. *Dancy, Hyman & Co.* v. *Hubbs*, 424.

See ABATEMENT; HOMESTEAD &C., 3.

EXECUTION SALE.

See SALE, 2.

EXTRA ALLOWANCE.

See JUDGE SUPERIOR COURT, 1, 2.

FEES.

1. Solicitors, before the passage of the Act of 1873-'74, chap. 170, were entitled to the fees allowed by the Rev. Code, chap. 102, sec. 14; and in cases of insolvent defendants, the County Commissioners were required to pay them. *Cantwell* v. *Commissioners of New Hanover*, 154.

FIXTURES.

A cotton gin and press annexed to the freehold in the usual way become fixtures: *Therefore*, where A had mortgaged his land to B to secure the payment of certain debts, and afterwards built thereon a gin house in which he placed a cotton gin and press, attaching them in the usual manner, occupying and using the same for a number of years and then sold the equity of redemption, together with certain personal property, including the gin and press by name, to C; and B having sold the land under the first trust, excepting the gin and press, but making no exceptions whatever as to gin and press in his deed to the purchaser: *Held*, that the purchaser at B's sale acquired title to the gin and press, as any verbal exceptions at the sale would have no effect in controlling the provisions of the deed. *Bond* v. *Coke*, 97.

FORCIBLE ENTRY AND DETAINER.

The finding of the jury on an inquisition of forcible entry and detainer before a Justice of the Peace cannot be traversed in the Superior Court to which it has been carried by *recordari*. If there has been an irregularity or error in law in the proceedings, or if the verdict of the jury be insufficient to support the judgment of the Justice, it will be quashed. *Griffen* v. *Griffen*, 304.

FORCIBLE TRESPASS.

1. Where the defendants, two white men, go to the house of the prosecutor, a colored man, and one of them claims a cow, (asserting his purpose to carry the cow away,) then in possession of and claimed by the prosecutor who protests against the defendant's taking the cow; and while the latter has gone to a neighbor's to procure evidence to prove his title, the defendants drive the cow off, they are guilty of a forcible trespass. *State* v. *McAdden*, 207.

2. The defendants, who rode to and fro along the public highway, shouting, cursing and using violent and menacing language, stopping in front of the prosecutor's house, and in his presence, (the prosecutor owning the land on both sides of said road,) are guilty of forcible trespass. *State* v. *Widenhouse*, 279.

3. If a defendant enter upon land, or travel an open way, (the trespass charged,) under a *bona fide* claim of right, he is not criminally guilty of a trespass on land under the statute. *State* v. *Hause*, 518.

4. And he is not guilty, if at the time it was done he believed he had the right to enter or travel on or over the road, because he and the former owners of the land had done so for sixteen or seventeen years. *Ibid.*

FORNICATION AND ADULTERY.

See JUSTICES OF THE PEACE, 3; SUPERIOR COURTS, 4.

FORMER ACQUITTAL.

See APPEAL, 3.

FRAUD.

That a sale, authorized under a deed of trust, is postponed for three years, is no such presumption of fraud as will avoid it, when no possession of the land conveyed, nor other benefit, is reserved to the grantor. *Starke* v. *Etheridge*, 240.

GUARDIAN AND WARD.

1. The rule for compounding interest upon notes due guardians is "to make annual rests," making the aggregate of principal and interest due at the end of a particular year a capital sum, bearing six per cent. interest, thence forward for another year, and so on. *Little* v. *Anderson*, 190.

2. Therefore, where the ward arrived at full age November 1st, 1863, *it was held*, that a note due his guardian bore compound interest up to that date, and thereafter simple interest upon the whole amount, principal and interest due at said date. *Ibid.*

3. A guardian may, without special reason to the contrary, discharge himself by delivering over to the ward upon a settlement, the notes he has taken as guardian. *Whitford* v. *Foy*, 537.

4. This Court will not review the finding of a referee as to the commissions allowed a guardian, unless such commissions are shown to be grossly erroneous. *Ibid.*

See EXECUTORS AND ADMINISTRATORS, 9, 10; STAT. LIM., 1.

HEIRS.

See EXECUTORS AND ADMINISTRATORS, 3; JUDGMENT, 2; PARTIES, &C., 2, 4, 7; PARTITION, 1.

HERTFORD, TOWN OF.

See CITIES, &C., 2.

HOMESTEAD—PERSONAL PROPERTY EXEMPTION.

1. An officer who levies upon the personal property of the defendant in the execution, and refuses to lay off to such defendant upon demand, his personal property exemption, is guilty of a misdemeanor. *State* v. *Carr*, 106.

2. A sheriff is not compelled to lay off a homestead or a personal property exemption before his fees for such service are tendered or paid. *Vannoy* v. *Haymore*, 128.

3. The lien acquired by the levy of a Justice's execution on the 27th of February, 1868, is lost by the plaintiff's taking out a new execution on the same judgment on the 1st day of August following; and a sale under the latter must be made subject to the defendant's right to a homestead. *Martin* v. *Meredith*, 214.

4. The personal property exemption is confirmed by the Constitution, and is inviolable; it cannot be reached by execution nor forfeited by any attempt to make a fraudulent conveyance. *Duvall* v. *Rollins*, 218.

HUSBAND AND WIFE.

See PARTIES, &c., 3, 6.

INCUMBRANCE.

See COVENANT; DOWER; MORTGAGE, 4; PARTITION, 2; WILLS.

INDICTMENT.

1. In an indictment for arson, the ownership of the property is well laid in the widow of the deceased owner, who had occupied and used the same since her husband's death, although there were living heirs, and no dower had been allotted to her. *State* v. *Gailor*, 88.

2. Where property is charged in an indictment for larceny as belonging to A and another and it is proved on the trial to be the property of A and B, a firm well known in the community, the apparent variance is cured by the Act of Assembly, Bat. Rev., chap. 33, sec. 65. *State* v. *Capps*, 93.

3. An indictment charging the defendant with stealing "two five dollar United States Treasury notes, issued by the Treasury Department of the United States Government, for the payment of five dollars each, and the value of five dollars:" *Held* to be good. *State* v. *Thomason*, 146.

4. An indictment for selling or giving away spirituous liquors during a public election should set forth the name of the person to whom the liquor was sold or given. *State* v. *Stamey*, 202.

5. When in such indictment, the offence was charged to have been committed "on and during an election day," the statute only making it an offence when done "during," &c., "a public election," *it was held*, that the variance was fatal. *Held further*, that the indictment should have negatived the selling upon "the prescription of a practising physician and for medical purposes," which is allowed by the act. *Ibid.*

6. Riding unarmed through a Court House, after the Court has adjourned and the crowd gone home, may or may not be a criminal offence, according to circumstances. It is for the jury to say, whether or not it was done in such manner and in such presence and at such time as would make the offence criminal. *State* v. *Lanier*, 288.

7. In an indictment under the 12th section, chap. 64, Bat. Rev., for removing a part of the crop, &c., when there is conflicting testimony as to the notice of the lien: *It is error* for the presiding Judge to refuse to charge,

that if the jury believed the defendants had no notice of the lessor's lien, they would not be guilty. *State* v. *Sears*, 295.

8. When on the trial, it was proved that the defendants had a license from the tenant, and such fact is not charged in the indictment, the judgment will be arrested. *Ibid.*

INJUNCTION.

1. In an application for a special injunction, when the property is in *custodia legis*, the Court will not let go the property and allow the same to be sold, if there is a probability that the merits are with the plaintiff, notwithstanding the defendants's answer denies the allegation upon which such application is founded. Where the material facts of plaintiff's complaint are not denied, the injunction will more certainly be continued to the hearing. *Ponton* v. *McAdoo*, 101.

2. An injunction, restraining defendants from working turpentine trees, when the answer meets every material allegation of the complaint, and the mischief complained of is not irreparable, will be dissolved upon the hearing of the complaint and answer. *Bell* v. *Chadwick*, 329.

3. The entry on land that a Court can enjoin, is only an entry under force or color of legal process. It will not enjoin a mere trespass, unless irreparable damage is threatened. *German* v. *Clark*, 417.

4. Pending an action for the recovery of land, an injunction does not lie, restraining the defendant from enjoying the fruits of his possession and claim of title; and especially when it does not appear that the plaintiff will loose the fruits of his recovery, if he establishes his title. *Baldwin* v. *Burnett*, 463.

See JUDGE SUPERIOR COURT, 4; POSSESSION, 5.

INSURANCE.

1. A clause in an application for a policy of insurance, that the party insured was to take an inventory of his stock every three months, is not a condition by which the policy was to be defeated and become of no force. *Wynne* v. *Liverpool & London Ins. Co.*, 121.

2. The finding of a jury that the loss of the plaintiff was $3,062 of which the sum of $462 is the *value* of the store, and $2,600 the *value* of the stock on hand, should be read, is the *damage* on account of the destruction of the store and goods. *Ibid.*

3. The *failure* of a mutual insurance company does not constitute a "failure of consideration," so as to defeat an action upon a premium note given by a person insured therein. *N. C. M. Life Ins. Co.* v. *Powell*, 389.

4. Such a company after its insolvency looses the power of insisting upon forfeiture of stock by its members for non-payment or otherwise. *Ibid.*

5. If such a company before insolvency treat a member who has failed to pay as if he were still a member, this is a waiver of the right to declare his stock forfeited for the non-payment. *Ibid.*

6. A resolution by such a company to wind up its affairs is equivalent to an assessment of 100 *per cent.* on the premium notes in order to enable it to meet its liabilities, &c. *Ibid.*

7. The holders of policies in insolvent mutual insurance companies cannot, when sued upon their premium notes, claim that the *values* of their policies (supposing the same to be ascertained,) shall be set off in equity against their liabilities. *Ibid.*

8. The premium upon a Policy of Life Insurance is considered paid to the Company, when, according to instructions, it is delivered to the Express Company, addressed to the Agent of the Insurance Company. *Whitley* v. *Piedmont & Arlington Life Ins. Co.*, 480.

9. A Policy of Life Insurance is not binding until the premium is paid—such a clause being contained in the application. And it is the duty of the of the assured to communicate to the Company, any material change in his health, in the interval between the application and the completion of the contract by the payment of the premium. *Ibid.*

INTEREST.

The provision in the charter of the Bank of Statesville, that the Bank "may discount notes and other evidences of debt, and lend money upon such terms and rates of interest as may be agreed upon," does not authorize the Bank to charge more than the legal rate, 8 *per cent.*, for money loaned. *Simonton* v. *Lanier*, 498.

See GUARDIAN, &C., 1, 2; MANDAMUS, 1.

JUDGE'S CHARGE.

On the trial below, the presiding Judge, in his charge to the jury, remarked, "I shall hold that the plaintiffs are justifiable in bringing this action:" *Held*, in the absence of any proper connection with the case, and as justifying them in returning a verdict for the plaintiff, that such remark was error, and entitled the defendant to a new trial. *Johnson* v. *Johnson*, 402.

See NEW TRIAL, 1, 3.

JUDGES OF THE SUPERIOR COURTS.

1. The Judge of a Superior Court has no power to make to the Clerk of one of the Courts in his District an allowance for extra services. *Brandon* v. *Commissioners of Caswell*, 62.

2. The Judge of Superior Court has no power to order the Commissioners of one of the counties in his district, to pay the sheriff any sum for his services in attending upon the Court. *Griffith* v. *Commissioners of Caswell*, 340.

3. If, on a trial, the verdict of the jury is, in the opinion of the presiding Judge, contrary to the weight of the evidence, he has a discretion to set such verdict aside, which discretion cannot be reviewed in an appellate Court. *Watts* v. *Bell*, 405.

4. A Judge of a District, other than that in which a case is pending, has authority to issue in such cause a restraining order; although he cannot vacate or modify the same. *Mauney* v. *Commissioners of Montgomery*, 486.

5. When an issue is made up in this Court and sent down to the Superior Court for trial, if on the second trial, in the opinion of the presiding Judge, such issue is too particular and special to meet the merits of the case, he has the power to alter and change the same, so as to embrace all the matters in controversy. *Barnes* v. *Brown*, 507.

See ACCOUNT; EVIDENCE, 10, 11; EXCUSABLE NEGLECT, 2; JURORS, 3; SUPREME COURT.

JUDGMENT.

1. A docketed judgment is a lien upon the lands of the debtor, although it does not divest the estate out of the debtor, nor does it make the land primarily liable for the debt, though the lien exists. *Murchison* v. *Williams*, 135.

2. And where the debtor dies, the land descends to the heirs subject to the lien; which lien, however, is subject to the right of the heirs to have the debt paid by the personal property, if there is enough for that purpose; if there is not enough to pay the debt, then the land may be sold for assets by the administrator. *Ibid.*

3. In a judgment by default, the plaintiff can only take so much as is authorized by his complaint. If the judgment be for more, it is irregular. *White* v. *Snow*, 232.

4. If the demand in a complaint is for unliquidated damages, and a judgment by default is taken for a sum certain, it is irregular, and will be set aside upon a proper proceeding. *Ibid.*

5. When one judgment is rendered in favor of two plaintiffs, their claims being several and distinct, *it is error*, which would entitle the defendant to have such judgment reversed, if he had suggested an injury. If no injury is or can be shown, and the record contains the material upon which a severance of the judgment can be made, if asked for, it will be referred to the Clerk to make the same. *Libbett* v. *Maultsby*, 345.

6. A judgment against the sureties on a promisory note given in 1862, for land, for the full face of the note and interest, nothing else appearing, *is erroneous*. The liability of the sureties is either for the scaled value of the note, at its date, or the value of the land. *Bryan* v. *Harrison*, 478.

7. The negligence of counsel in not objecting, at the proper time, to the reception of incompetent evidence, from which the jury find that the grantor was mistaken when she executed the deed, as to its conveying a certain tract of land, is not necessarily fatal, and will not preclude the presiding Judge from giving judgment, of his own motion, *non obstante veredicto*. *Murray, Ferris & Co.* v. *Blackledge*.

See ABATEMENT; COURTS OF PROBATE, 6; LIEN; NOTICE, 3; PRACTICE CIV., 6, 14; REHEARING, 2; SUPREME COURT, 3.

JURORS.

1. It is no objection to a tales juror, that his name does not appear on the jury list, as made out by the County Commissioners, and a challenge for that cause was properly overruled. *Lee* v. *Lee*, 139.

2. Application for a jury, not made in apt time, is not a matter of right, but is addressed to the discretion of the Court, and is not the subject of review. *Shehan* v. *Malone & Co.*, 440.

3. Where there appears upon the record no waiver of trial by a jury, *it is error* for the presiding Judge to determine the facts. *Rowland* v. *Thompson*, 467.

See PRACTICE CIV., 11.

JUSTICES OF THE PEACE.

1. A creditor, whose account consists of several items, either for goods sold or labor done at different times, each of which is for less than $200, although the aggregate of the account exceeds $200, may sue before a Justice for any number of such items not exceeding $200. *Boyle* v. *Robbins*, 130.

2. If, however, the debt is an entire one, consisting of but one item, and exceeds $200, it cannot be divided to give the Justice jurisdiction. *Ibid.*

3. Justices of the Peace have exclusive jurisdiction of the offence of fornication and adultery. Act of February 10, 1874, chap. 176, sec. 3. *State* v. *Vermington*, 264.

4. Where a plaintiff purchases an outstanding incumbrance for $30, for the purpose of perfecting his title to a lot of land purchased of the defendant, and then sues defendant for a breach of contract in not delivering to him a perfect deed, as he promised to do: *Held*, that the sum demanded for the breach of contract being under $200, the exclusive jurisdiction of the case was in a Justice of the Peace. *Templeton* v. *Sumners*, 269.

See BONDS; ELECTION, 2; PRACTICE CRIM., 2.

LANDLORD AND TENANT.

1. The difference between a tenant and a cropper is, a tenant has an estate in the land for the term, and consequently he has a right of property in the crops. If he pays a share of the crops for rent, it is he that divides off to the landlord his share, and until such division the right of property and of possession in the whole is his. A cropper has no estate in the land, and although he has, in some sense, the possession of the crop, it is only the possession of a servant, and is in law that of the landlord who must divide off to the cropper his share. *Harrison & Son* v. *Ricks*, 7.

2. A rents from B a farm for one year, B agreeing verbally to furnish and feed the teams, and to find the farming utensils to make the crop, and to furnish A corn and bacon during the year, for which he was to be paid out of A's share; A was to furnish and pay for the labor and give B one half of the crop as rent: *Held*, that A was a tenant and not a cropper, who had a right to convey the crop, subject to the right of the landlord to his share as rent. Act of 1868-'69, chap. 64, cited and commented on. *Ibid.*

See POSSESSION, 2, 3.

LARCENY.

See INDICTMENT, 2, 3.

LEGACIES, &C.

See COURTS OF PROBATE, 5, 7; EXECUTORS AND ADMINISTRATORS, 1; TRUSTS, &C.

LEGISLATIVE SCALE.

See CONFEDERATE MONEY.

LEVY AND SALE.

See DEEDS, &C., 1; EXECUTION.

LIEN.

Whether a lien created by a levy prior to the docketing of a judgment is continued by virtue of such docketing, without pursuing it by a *ven. ex.*, or whether a *fi. fa.* issued on such docketed judgment, waives the lien created by the levy before docketing.—*Quere?* *Baldwin* v. *Burnett*, 463.

See EXECUTION; HOMESTEAD, 3; JUDGMENT, 1.

LIMITATIONS, STATUTE OF

1. In the case of a guardian bond, the statute of limitations begins to run from the time of the ward's coming of age, and not from the time of demand. *State ex rel. Harris* v. *Harris*, 174.
2. Residing beyond the limits of the State is not being "beyond the seas," and does not prevent the running of the statute. *Ibid.*
3. Twenty years possession of an easement raises a presumption of a grant. In computing that twenty years, the time from the 20th day of May, 1861, until the 1st day of January, 1870, shall not be counted, so as to presume the abandonment of any rights by the plaintiffs. *Benbow* v. *Robbins*, 338.
4. Where the right of action by a *cestui que trust* against a trustee accrued prior to the adoption of the Code of Civil Procedue in August, 1868, the limitation prescribed in the Code does not apply, but it is governed by the law as it stood before the enactment of the Code; and as there was no statute limiting the time when such actions should commence, it is left to the principle established by Courts of Equity in such cases. *Labbett* v. *Maultsby*, 345.

MALICE.

See EVIDENCE, 6.

MANDAMUS.

1. Coupons attached to bonds issued by a county to pay its subscription to a railroad company bear interest at the rate of six *per cent.* from the time they become due. *McLendon* v. *Commissioners of Anson*, 38.

2. *Mandamus* may be applied for in a suit brought to recover certain coupons due from a county, and is the proper remedy to enforce the judgment. *Ibid.*

3. An application by a holder of N. C. bonds for a *mandamus* to be directed to the Auditor of the State, commanding him to cause to be levied certain special taxes to pay the accrued interest on said bonds, is an application "to enforce a money demand," and as such, a Judge at Chambers has no jurisdiction thereof. *Belmont & Co.* v. *Reilly*, 260.

See COUNTY COMMISSIONERS, 2.

MARRIAGE CONTRACT.

See CONTRACTS, &c., 4.

MECHANIC'S LIEN.

1. The notice of the claim to enforce a mechanics' lien, within the jurisdiction of a Justice of the Peace, may be filed with the Clerk of the Superior Court. *Boyle* v. *Robbins*, 130.

2. In order to create a lien in favor of a person who builds a house upon the land of another, the circumstances must be such as to first create the relation of debtor and creditor; and then it is for the *debt* that he has a lien. *Wilkie* v. *Bray*, 205.

3. The lien of a plaintiff, who furnished materials for building, is not avoided, because in the notice thereof, filed with the Clerk, it is made to attach on two distinct lots separated by a street. *Chadbourn* v. *Williams*, 444.

4. The notice of a lien required to be filed, since the Act of 1869-'70, chap. 206, sec. 4, should be filed in the office of the Clerk of the Superior Court; although the materials began to be furnished before that act went into effect, when the law of 1868-'69 was in force. *Ibid.*

5. A lien attaches from the time the materials begin to be furnished, and the notice relates back to that time. *Ibid.*

MISTAKE.

See SUPERIOR COURT, 5.

MORTGAGES.

1. Where a mortgagee dies, and a Court of Probate upon an *ex parte* application appoints a trustee under the act of 1869-'70, chap. 168, the irregularity of such proceeding is cured by the act of 1873-'74, chap. 127, sec. 2, undertaking to cure such appointments "confirming and making valid the same," &c. The act of 1873-'74, chap. 127, sec. 2, although retrospective, is not unconstitutional in respect to the facts of this case. *Etheridge* v. *Vernoy*, 184.

2. A mortgagor has the right to release his equity of redemption to the mortgagee, though the Courts look with suspicion on such release, and

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require proof that the same is free from fraud and for a fair and adequate price. In the case of an assignment of his right of redemption to a stranger, there is no such jealousy, and if the mortgagor would avoid his assignment, he must prove fraud as in other cases. *Barnes* v. *Brown*, 507.

3. A mortgagee may purchase the equity of redemption from any person to whom the mortgagor has assigned it, or at an execution sale had at the instance of such stranger. *Ibid.*

4. A party who purchases the equity of redemption in a first mortgage, with full knowledge of the rights of the assignees of the mortgagee, and who, as mortgagee under a second mortgage, is tenant in common with the assignees of the first, in the lands therein conveyed, which lands are charged with an incumbrance under a decree of partition, is primarily bound to extinguish such incumbrance, as well as all others existing or afterwards accruing. *Pullen* v. *Heron Mining Co.*, 563.

See ACTION, 1; CONTRACTS, &c., 2; PARTIES, &c., 4. 9; POSSESSION; PRACTICE CIV., 8.

N. C. RAILROAD CO.

See NEGLIGENCE.

NAVIGATION, OBSTRUCTING.

See NUISANCE, 2.

NEGLIGENCE.

Where the hogs of the plaintiff were attracted to the warehouse of the defendant by the drippings of molasses from defendant's cars, and were killed by the trains suddenly starting or approaching without the usual alarm, it was such negligence as entitled the plaintiff to damages. *Page* v. *N. C. Railroad Co.*, 222.

NEWBERN.

See CITIES, &c., 4.

NEW TRIAL.

1. Where one is sued alone upon a verbal contract, and the evidence on the trial tends to show that the contract was made with the defendant and another person, it is error in the Court to leave it to the jury to say whether there was a sale to the defendant alone, and the defendant is entitled to a new trial. *Smith* v. *Fort*, 43.

2. If, on a trial below, the jury omit to find a matter which goes to the very point of the issue, the new trial granted by the Supreme Court must be *in toto*; but when, on that trial, all the material issues have been correctly found, and the error does not touch the merits, the Supreme Court may award a partial new trial to correct the error. *Holmes* v. *Godwin*, 306.

3. A remark of the Judge below, calculated to mislead and prejudice the minds of the jury is error, and entitles the party against whom it is made to a *venire de novo*. *Sprinkle* v. *Foote*, 411.

NON-RESIDENTS.

See AMENDMENTS, 2.

NON-SUIT.

See PRACTICE, CIV., 1, 10.

NOTICE.

1. A sells a tract of land to B, agent of C, taking in payment therefor C's check on a bank in Columbia, S. C., at the same time making C a deed; upon presentation the payment of the check was refused, and B, the agent, duly notified thereof. In this action to recover the value of the check, *Held* that notice of its non-payment to the agent was notice to the principal: *Held further*, that the consideration of the check being land sold in 1865, the jury might ascertain the value of the land in present currency, and return that as their verdict. *Farmer* v. *Willard*, 284.
2. *Held also*, that, as C accepted a deed for the land through his agent B, that was a sufficient compliance with the law in relation to frauds and fraudulent conveyances. *Ibid.*
3. Notice of an application to a Court for leave to issue a *ven. ex.*—the judgment having been obtained in 1861, and the last execution thereon returned more than three years from the date of such application, and the defendant therein being dead—must be served on the personal representative of such defendant. *Aycock, to use Isler* v. *Harrison*, 432.

See BANKRUPTCY; MECHANIC'S LIEN, 1, 3, 4, 5; PARTITION, 2.

NUDUM PACTUM.

See CONTRACTS, &C., 1.

NUISANCE.

1. When a nuisance has been established by the verdict of a jury, the presiding Judge committed no error in giving the defendant to a certain time to abate it; and if that was not done, in giving the plaintiff the privilege of renewing his motion for an injunction. *Hyatt* v. *Myers*, 271.
2. The defendants are guilty of no offence in tearing down a portion of the Railroad bridge over Neuse river below Kingston, when by so doing they were removing obstructions to the free navigation of that river. *State* v. *Parrott*, 311.

PARTNERS.

See SET OFF, 1.

PARTIES PLAINTIFF AND DEFENDANT.

1. Where the holder of a claim, secured by a lien, prior to the commencement of an action against the defendant, assigns a portion of his claim to another person, such assignee is not a necessary party to the action. *Boyle* v. *Robbins*, 130.

2. The heirs-at-law of a testator and the devisees of the residuary interest are necessary parties to an action seeking the construction of certain parts of a will. *McKeethan* v. *Ray*, 165.

3. The wife of a mortgagor has no such interest in the lands mortgaged, as make it necessary that she should be a party to a proceeding to foreclose the mortgage. *Etheride* v. *Vernoy*, 184.

4. Generally, the heirs of a mortgagee are necessary parties to a bill to foreclose. This is not always so, as for instance, when the mortgagee assigns his interest in the mortgage, and the debt secured therein, leaves the State and dies insolvent, leaving in his heirs, who are non-residents, the dry, naked, legal title only, such heirs are not necessary parties to a proceeding to foreclose the mortgage. *Ibid.*

5. An inhabitant of one belligent country cannot maintain an action against a soldier of the hostile belligerent for a trespass to the property of the former, done by the soldier in the course of his military duty. *Broadway* v. *Rhem*, 195.

6. The husband of a plaintiff, in an action for a breach of promise of marriage, married since such action commenced, is not a necessary party thereto. Nor does such action abate on account of the death of the defendant. *Sholan* v. *Millsaps' Executor*, 297.

7. In a motion for an execution upon a judgment obtained in the lifetime of the defendant's testator, and which is a lien upon his lands, his heirs are necessary parties, and if some of them are infants, some discreet person who will act, should be appointed guardian *ad litem* for such infants, and defend as the law prescribes. *Isler* v. *Murphy*, 436.

8. A citizen of a township, representing a class, may bring an action for the purpose of testing the validity of a certain township election, and another citizen, for himself and others of the same class, upon the same principle, are allowed to come in and defend such action. *Perry* v *Whitaker*, 477.

9. In an action to foreclose a mortgage, the mortgagees are necessary parties, in order that the legal title may pass to the purchaser. A mortgagee who has assigned his interest is not a necessary party. *Pullen* v. *Heron Mining Co.*, 567.

PARTITION.

1. When in a decree, made in a petition for partition, some of the heirs are required to account for advancements and others were not, and when such decree was made without the knowledge or consent of some of the parties, and was not signed by the Judge and was otherwise informal, the same will be set aside and another decree made. *Collins, ex parte*, 256.

2. Charges upon land, for equality of partition, follow the land into the hands of all persons to whom it may come; and they are held to be affected by constructive notice. *Ruffin* v. *Cox*, 253.

3. The widow of the party upon whose land the charge is placed, is not a necessary party to an action brought to recover the sum charged. *Ibid*

POSSESSION.

1. Possession, if open, notorious and exclusive, puts a purchaser upon enquiry, and is notice of every fact which he could have learned by enquiry; and if the purchaser lived in another State, the principle of constructive notice applies notwithstanding. *Edwards* v. *Thompson*, 177.

2. The possession of a tenant has the same effect in regard to notice as possession by the landlord. *Ibid.*

3. An adverse possession, to have the effect of leaving in the true owner the right of action only, must be hostile to him, and under a claim and with the exercise of the rights and privileges of permanent ownership. *Duvall* v. *Rollins*, 218.

4. Where the defendant has been put out of the possession of certain premises by an abuse of the process of the law, and this Court has ordered the Superior Court to issue a writ of restitution, the possession must be restored to the defendant before the Court will entertain an application for an injunction, or pass upon the further rights of the parties. *Perry* v. *Tupper*, 385.

5. Where a party has been put out of possession of land by an abuse of the process of the law, there must be restitution as a matter of course, unless some new matter has intervened in the mean time. And until restitution is made, no application for an injunction will be entertained by the Court. *Ibid*, 387.

6. The possession of a mortgagor is not adverse to the possession of the mortgagee, so as to prevent the assignment of the mortgage by the latter. *Murray, Ferris & Co.* v. *Blackledge*, 492.

See EJECTMENT; EVIDENCE, 12.

PRACTICE—CIVIL CASES.

1. A motion to non-suit a plaintiff in the midst of a trial on the ground that his evidence does not make out a case—the defendant's counsel at the time stating that "if his Honor should overrule the motion, he had evidence to offer, showing title in himself," is an unfair and loose mode of practice, and should not be tolerated. *Stith* v. *Lookabill*, 25.

2. In a petition to sell land for assets, the purchasers of the land sold are not permitted by a motion in the cause to litigate questions arising because of a trespass committed, or to have questions of boundary decided. *Clement* v. *Foster*, 36.

3. If a special verdict find facts of an unequivocal character, the Court can declare the guilt or innocence of the defendant as a question of law; but if the facts found are equivocal—may mean one thing or another—then the Court cannot determine as a question of law the guilt or innocence of the defendant. *State* v. *Curtis*, 56.

4. Counsel for appellants are not justifiable in making up a case in such a way as to leave the Court in doubt as to the point intended to be made; every intendment must be made against the appellant. *Wynne* v. *Liverpool & London Ins. Co.*, 121.

5. A defendant cannot, by demurrer, avail himself of a defence denying his violation of a town ordinance. The averments of the complaint as to such violation, in the absence of an answer, must be taken as true. *Commissioners of Edenton* v. *Capehart*, 156.

6. It is an object in every system of procedure to have cases heard and determined upon their merits. Therefore a party has a right to move to set aside a judgment rendered against him within a year; and if that motion is abandoned for another proceeding, which is also given up, the whole proceedings may be considered as a continuation of the original motion *Howell* v. *Harrell*, 161.

7. Section 313, C. C. P., does not confer on parties, who differ as to their rights, authority to propound to the Court, on a case agreed, interrogatories in respect thereto. The purpose of the section is simply to dispose of the formalities of a summons, complaint and answer, and upon an agreed state of the facts, to submit the case to the Court for decision. *McKeethan* v. *Ray*, 165.

8. In a proceeding to foreclose a mortgage, when the defendant pleads that the debt has been paid, the Judge below must decide whether a proper case has been made, justifying him in suspending a judgment for a plaintiff whose legal right of possession is not denied, until the determination of the question whether the mortgage debt has been paid or not. If the debt has not been paid, the plaintiff is entitled to judgment, unless the defendant shall pay under the order of the Court what is found to be due and unpaid. *Edwards* v. *Thompson*, 177.

9. Where the record is carelessly prepared (as in this case the deed under which plaintiff claims not being made a part of it, nor the date of its execution shown) and the statement of the case is vague and irregular, no judgment will be given in the Supreme Court. *Jones* v. *Scott*, 192.

10. A plaintiff may elect to be non-suited when the Judge intimates an opinion that the Court has no jurisdiction of the action, and when the defendant has moved to dismiss for want of jurisdiction. *Pescud* v. *Hawkins*, 299.

11. When an issue of fact is raised, involving the merits of the controversy, and the defendant, in apt time, demands a jury to try that fact, *it is error* in the presiding Judge to refuse such demand, and try the issue himself. *Isler* v. *Murphy*, 436.

12. Parties are concluded by facts contained in the statement of the case for this Court. Therefore, where a defendant excepts to the report of a Commissioner because he did not report certain evidence, and the case shows that the evidence was reported, his exception was properly overruled. *Schehan* v. *Malone & Co.*, 44.

13. And where the exception is, that the Commissioner did not admit certain evidence, and the case does not show that such evidence was competent or material, the exception will be overruled. *Ibid.*

14. It is irregular for the plaintiff to move for judgment upon complaint and answer. If he admits the allegations of the answer, his proper course is to demur. *Baldwin* v. *Barnett*, 463.

15. It is a rule of this and all other Courts of error, that an exception will not be considered, which does not specifically and distinctly point out the error alleged and show wherein the error is conceived to consist. *Brumble* v. *Brown*, 513.

16. A party excepting to the report of a Commissioner, to whom it was referred to take an account, must designate particularly the charge or credit excepted to, and refer the Court distinctly and clearly to the ground of his exception. Exceptions, unaccompanied by such statement of facts will be overruled; as this Court will not, nor will any Court of appeal, examine every item in the account, and the evidence bearing on it, upon a general allegation of error. *Whitford* v. *Foy*, 527.

See ACTION, 3; ANSWER; COURTS OF PROBATE, 6; EXCUSABLE NEGLECT; INJUNCTION, 1, 4; JUDGES'S CHARGE; JUDGMENT, 3, 4, 7; POSSESSION, 5, 6; SET OFF, 2.

PRACTICE—CRIMINAL CASES.

1. It is the province of the prosecuting officer to determine who shall be examined as witnesses on the part of the State, and at what time in the course of the trial he will rest his case. The presiding Judge may permit testimony to be introduced at any stage of the trial, and this Court will not interfere with the exercise of that discretion, unless in a clear case of abuse. *State* v. *Haynes*, 80.

2. Where a Justice of the Peace neglected, in a proceeding in bastardy, to recognize the defendant to appear at the next term of the Superior Court, but returned the warrant and examination thereto, a *capias* is the proper process to enforce the defendant's appearance, and he is bound to answer upon its return. *State & Wooding* v. *Green*, 172.

PRIVATE STATUTES.

The private Act of 12th December, 1863, incorporating the "Trustees of the N. C. Endowment Fund," being calculated and having the effect to aid the rebellion then existing, is void and confers no powers on the persons attempted to be incorporated.
RODMAN and READE, J. J. dissenting. *Trustees, &c.* v. *Satchwell*, 111.

RECEIPT.

See RECORD.

RECORDARI.

A *Recordari*, granted upon the application of the plaintiff, without notice to the defendant, and without any petition or affidavit setting forth the grounds upon which it should be issued, is irregular, and will be dismissed upon the hearing. *Wilcox* v. *Stephenson*, 409.

RECORDS.

1. If the record of the Court below is false, it cannot be corrected in this Court. *Neal* v. *Cowles*, 266.

2. The receipt of an attorney, not entered of record as a part of the proceedings of the Court, nor by its direction, is no part of the record; and if such receipt was improperly placed on the record, the Court should order its erasure, as being no part of the record proper. *Isler* v. *Murphy*, 436.

See PRACTICE CIV. 9; SUPREME COURT, 1.

REGISTRATION.

See CONTRACTS, &C., 2, 4; Deed, 4.

RE-HEARING.

1. Where the objections urged on a petition to rehear were not raised on a trial below, nor made in the case stated on the appeal and not argued upon the hearing in this Court, it is considered that every objection for want of proper parties had been waived or abandoned, and that the case was tried upon its merits. *Etheridge* v. *Vernoy*, 184.

2. This Court, upon a petition to rehear, will modify a judgment entered up at a previous term, when it appears that on account of the careless manner the case was made up, but one of the two defences relied on by the defendant was considered, and that on account thereof substantial justice was not administered. *Williams* v. *Williams*, 216.

3. A defendant, by a motion to re-hear a former judgment of this Court, cannot call on the Court to specifically perform a contract of compromise, alleged to have been made between the parties in the Superior Court. *Neal* v. *Cowles*, 266.

REMOVING CROPS.

See INDICTMENT, 7, 8.

SALE.

1. A sale is a transfer of the absolute or general property in a thing for a price in money. The price must be certain; and there can be no executed sale, so as to pass the property, when the price is to be fixed by agreement between the parties afterwards, and the parties do not agree. *Wittkowsky & Rintels* v. *Wasson*, 457.

2. A purchaser at execution sale does not occupy the same ground that a purchaser of the legal title for value and without notice, does; the former buys subject to all equities against the defendant, whether he knows of them or not. *Hicks* v. *Skinner*, 539.

See FRAUD; VENDOR, &c.

SALE OF REAL ESTATE FOR ASSETS.

Pending a reference to a Commissioner, to state an account of the personal assets in the hands of an administrator, in the latter's petition to make real estate assets, and before a confirmation of the report of such Com-

missioner, *it is error* for the presiding Judge to order a sale of the land. *Thompson* v. *Joyner*, 369.

See PRACTICE, CIV, 2.

SET OFF—COUNTER CLAIM.

1. Where a firm brings a defendant into Court to answer a claim for a debt which he owes them, he cannot only require *them* but either *one* of them to answer for a debt due him, whether it is connected specially with their debt against him, or is an independent claim. *Sloan & Co.* v. *McDowell*, 356.

2. A plea of set-off or counter-claim refers to the commencement of the action, and must be true and good at that date; and if it is not barred by the statute of limitations at that time, it does not become so afterwards, during the pendency of the action. *Brumble* v. *Brown*, 513.

SHERIFFS—CONSTABLES.

An officer, who receives notes for collection is bound on demand of settlement:

(1.) Either to return the notes, or to show some sufficient reason for not doing so;

(2.) If the notes were solvent when received by him, even if he offers to return them, he is liable, unless he shows that he used reasonable diligence, and failed to collect them;

(3.) If it be shown that he received any given note, although it be not shown that it was insolvent, yet if he fails to return it, there is a presumption of fact, that he either collected it or converted it to his own use. This presumption may be repelled by evidence, that the note could not have been collected, or that it has been accidentally lost or destroyed or any other evidence tending to repel the presumption of its collection or conversion. *Brumble* v. *Brown*, 513.

See AMENDMENT, 2; DEED, 1, 2; ESTOPPEL, 2. HOMESTEAD, 2; JUDGE OF SUPERIOR COURT, 2.

SOLICITORS.

See FEES; PRACTICE, CRIM. 1.

SPECIAL ADMINISTRATOR.

See EXECUTORS & ADMINISTRATORS, 8.

SPECIAL VERDICT.

See PRACTICE, CIV. 3.

STATUTE OF FRAUDS.

See NOTICE, 2.

SUPERIOR COURSS.

1. Upon appeal to the Superior Court, from an order of the Probate Judge appointing or removing an administrator or executor, the Superior Court does not acquire jurisdiction to appoint or remove such persons; but, when necessary, after determining the questions presented by the record, must issue a *procedendo* to the Probate Judge, requiring him to appoint some proper person to administer the estate. *Pearce* v. *Lovinier*, 248.

2. The Court below has a discretionary power to allow the plaintiff to amend his complaint and the defendant his answer; and from the exercise of this discretionary power, no appeal lies to this Court. *Carleton* v. *Byers*, 331.

3. The refusal of the presiding Judge on a trial in the Court below, to dismiss the plaintiff's action, while he appeared and was regularly prosecuting it, was not a judgment from which an appeal will lie. *Ibid.*

4. The Superior Courts were deprived of their jurisdiction over the offence of Fornication and Adultery, by the act of 1873-'74, chap. 176; and although a bill was found at the January Term, 1874, before that act was ratified, still the Court could not proceed with the trial. *State* v. *Perry*, 522.

5. An obvious and palpable mistake, which a Court would correct of course on motion, needs no correction and may be disregarded. *Millsaps* v. *McCormick*, 531.

See AMENDMENTS, 2; FORCIBLE ENTRY; RECORDS, 1, 2.

SUPREME COURT.

1. Whenever the record from the Court below, whether upon a "case agreed," or a "case stated," presents clearly and fully the merits of the whole case, this Court will render such judgment thereon as the Court below ought to have done. *Duvall* v. *Rollins*, 21[a].

2. If the Supreme Court commits an error in its judgment ordering the Superior Court to issue certain process, the only way to remedy it, is by a petition to re-hear. For the Judge below to refuse to obey such order, would be judicial insubordination, not to be tolerated. Nor is it allowed to a party in the cause to appeal from the order when made by the Superior Court, upon the ground that that Court had no right to make it. *Perry* v. *Tupper*, 380.

3. When there has been a final determination of a cause in the Court below, an appeal brings up the whole *cause* to this Court, in which the judgment is affirmed, modified or reversed, such judgment being given, as of right the Superior Court ought to have given. If the appeal is from an interlocutory *order*, the *cause* does not come up to the Supreme Court, but only the *order*, which is decided, and the decision certified to the Superior Court, to the end that the *cause* may be proceeded with. *Ibid.*

See CERTIORARI.

TAXATION.

See COUNTY COMMISSIONERS, 1, 2, 3; TOWNSHIP TRUSTEES.

TOWNSHIP TRUSTEES.

Township Boards of Trustees are forbidden by the Act of 1873-'74, chap. 106, sections 1 and 2, to levy and collect taxes for necessary expenses—and although such taxes were *ordered* before the passage of that Act, they cannot be collected since its passage. *Mitchell* v. *Trustees of Township No.* 8, 400.

TRUSTS AND TRUSTEES.

1. When it is alleged in the complaint that the defendant, a trustee, has become insolvent, and is using the fund for his own private advantage, refusing to pay the accrued interest, &c., and that his bond as trustee has become insolvent or of doubtful solvency, the plaintiffs are ent tled not only to an enquiry as to the solvency of defendant's bond, but also to an account of the condition of the trust fund. *Walker* v. *Sharpe*, 257.

2. Where a legacy was given to the defendant *in trust*, "the principal and interest to be expended for the maintenance and education" of the plaintiffs, as the trustee thinks best: *Held*, that the *cestui que trust* (the plaintiffs) were entitled to an account as to the manner in which the legacy had been expended. *Libbett* v. *Maultsby*, 345.

See ACTION, 4; ATTACHMENT, 1; STAT. LIM., 4; MORTGAGES, 1.

VENDOR AND VENDEE.

When a vendee, upon a parol contract to convey lands, which the vendor afterwards refuses to perform, has made payments of the purchase money, or being put into possession has expended money in improvements, he is entitled to be reimbursed. *Barnes* v. *Brown*, 507.

VENUE.

See ACTION, 1.

WIDOW.

See PARTITION, 3.

WILMINGTON.

See CITIES, &c., 1.

WILLS AND TESTAMENTS.

A wills to his daughter B as follows: "I will and bequeath to my daughter B a negro boy named Wilson, and all the other property that she has in her possession; and at my death, I will and direct that my executors pay her the sum of $75, for the purchase of a horse beast: And at the death of my wife, I will and bequeath B the tract of land I purchased from R. Summey, she accounting to my estate for the sum of three hundred and fifty dollars, which my executors retain out of my estate previous to her receiving any more of my estate;" *Held* that this $350 is not a charge

upon the land devised to his daughter B; and that the intention of A was to direct his executor to retain that amount out of the share coming to her upon the death of his wife. *Bynum* v. *Hill*, 319.

WITNESSES.

1. Where a plaintiff declares for the value of property sold, as the consideration of a note given at an administrator's sale, it is competent for the witness proving the consideration, to refresh his memory from the account of sales kept by himself; and also to read the terms of the sale as they were read just before the sale commenced. *Cowles* v. *Hayes*, 230.
2. In an action by an executor to recover the amount of a certain bond which the defendant had collected and had not paid over to the testator, his father-in-law, the defendant's wife, a daughter of the testator, is a competent witness to prove that her husband, the defendant, offered to pay her father the money, but was told by him to keep it, as he intended it as an advancement to himself and the witness. *Bradsher* v. *Brooks*, 322.
3. A witness, who denies certain declarations alleged to have been made by defendant to him alone, cannot be impeached, as the declarations were not made in the presence of the other party; and as they related to a matter collateral to the issue, the answer of the witness must be taken as conclusive. *Hawkins* v. *Pleasants*, 325.

See EVIDENCE, 8, 9.

WRITTEN ORDER.

See EVIDENCE, 7.